

## **Red and Green Markers—What Is It Really All About?**

By Steve Feldhaus, Foundation Secretary

Members rightly want to know what is involved in the Foundation's dispute with Collier County over the County's attempt to install red and green lateral navigational marker in Clam Bay. They want and deserve to know why the Foundation cares so much about a few markers in a 530 acre conservation area. The reasons why the Foundation is and should be involved are, I believe, compelling.

In 1977, the Collier County Board of County Commissioners (BCC) approved the Pelican Bay Planned Unit Development (Pelican Bay PUD). The Pelican Bay PUD provided for land then owned by the developer of Pelican Bay to be set aside for the benefit of the residents of Collier County, including 36 acres for Clam Pass Park, 2 acres for the Clam Pass Park Parking Lot, and 5 acres for the Vanderbilt Beach Parking Lot and Bathroom Site. The Pelican Bay PUD also provided for the 530 acre conservation area (what we now call Clam Bay), also then owned by the developer of Clam Bay, to be set aside as a conservation and preservation area for the benefit of the residents of Pelican Bay. The Pelican Bay PUD directed the developer to file covenants on the 530 acre conservation area restricting it to conservation, preservation, and limited recreational use. This document was approved by the BCC on April 8, 1977 as Collier County PUD Ordinance 77-18. It has been amended numerous times, but the provisions for these set asides and these covenants have not changed.

On April 13, 1982, acting pursuant to the Pelican Bay PUD, the developer of Pelican Bay conveyed Clam Bay, Clam Pass Park, and the Clam Pass Parking Lot to the County via a Quit Claim Deed (Quit Claim Deed). The Vanderbilt Beach Parking Lot and Bathroom Site were also conveyed to Collier County via another Deed. The Quit Claim Deed was specifically made subject to a Declaration of Restrictions and a Declaration of Protective Covenants and Restrictions (the Declarations), as required by the Pelican Bay PUD. The Quit Claim Deed and the Declarations explicitly provide that Collier County cannot take any actions in Clam Bay, in Clam Pass Park or in the Clam Pass Park Parking Lot without the prior written approval of the Foundation. The Quit Claim Deed was accepted by the BCC on behalf of the County in writing on April 13, 1982, with full knowledge and pursuant to the requirement of the Pelican Bay PUD that the Quit Claim Deed was limited by, and subject to, the protective covenants and restrictions (collectively, the Restrictions).

Via Assignments dated March 7, 2003, and April 15, 2009, the successor in title to the developer of Pelican Bay, WCI Communities, Inc., assigned to the Foundation all of its rights with respect to the Quit Claim Deed and the Declarations. Today, the Foundation stands in the shoes of the developer of Pelican Bay as the entity entrusted with the power, and the obligation, to enforce the Restrictions.

It is a fundamental fact that the health of Clam Bay is important to property values in Pelican Bay. We have seen just a few years ago what happens when the mangroves begin to die off—it was not a pretty picture. The recent Strategic Planning effort identified our beach amenities as the most valued asset of the Foundation. Our ability to enjoy these facilities is clearly tied to a healthy Clam Bay. The developer of Clam Bay saw all of this, as did the County, when they jointly agreed pursuant to the Pelican Bay PUD

to the Quit Claim Deed, the Declarations, and the Restrictions, all of which placed the control of Clam Bay in the hands of the entity responsible for Pelican Bay (then the developer, now the Foundation).

In the past there was no need for the Foundation to use its powers under the Quit Claim Deed and the Declarations. For many years, the County ceded control over Clam Bay to the Pelican Bay Services Division (PBSD), which performed admirably in managing Clam Bay, largely using funds raised by taxing the members of Pelican Bay. Clam Bay thrived under the management of the PBSD, and even the die off of a portion of the mangrove forest was dealt with effectively by the PBSD. For all these years, the Members of Pelican Bay, and the Foundation, rightly felt that their interests in Clam Bay were being protected by the PBSD.

However, a dispute that began in the mid 1990s with the residents of Seagate, a community of approximately 90 homes immediately south of Pelican Bay, ultimately was one of several catalysts that purportedly led the County to withdraw from the PBSD the authority to manage Clam Bay. On September 9, 2008 the BCC passed Ordinance 2008-48, which created the Clam Bay Advisory Committee (CBAC) and entrusted the CBAC with the obligation to advise the BCC and the Coastal Advisory Committee (CAC), which reports to the BCC, on all aspects of Clam Bay, including the management, direction, health, and long term viability of the system. Since the formation of the CBAC, the County has effectively withdrawn from the PBSD the responsibility for the management of Clam Bay.

The dispute with the residents of Seagate involves their desire to access the Gulf of Mexico via boats. The homes in Seagate are located on canals, and a number of Seagate residents own various forms of watercraft. Seagate is located immediately south of Outer Clam Bay, the large and shallow body of water at the south end of Clam Bay. Currently, most boats (other than kayaks and canoes) can traverse Outer Clam Bay only at high tide.

Next to Seagate at the south end of Outer Clam Bay is a piece of land owned by the Foundation but subject to an easement in favor of the County for use as a canoe and kayak launch area. From this area, canoe and kayaks explore Clam Bay, currently with the assistance of markers in Outer Clam Bay delineating a canoe and kayak trail. The residents of Seagate, who also use this trail with their watercraft, at least at high tide, have wanted to mark the trail as a navigational channel, with red and green lateral navigational markers. The PBSD opposed the installation of these markers, and that opposition was at least one of the stated reasons that led the BCC to withdraw from the PBSD the authority to manage Clam Bay.

Unfortunately, despite the request of the Foundation, which was based upon the rightful role of the Foundation with respect to Clam Bay pursuant to the Pelican Bay PUD and the Restrictions, the BCC was not willing to put any representatives of the Foundation on the CBAC. Furthermore, despite the repeated requests of the Foundation, the County was not willing to honor the Restrictions, which explicitly require the written approval of the Foundation before signs such as these markers can be installed in Clam Bay. This past spring the issue of the red and green lateral navigational markers was considered by the CBAC, which recommended their installation, and by the BCC, which approved their

installation. The matter is currently under consideration by the Florida Department of Environmental Protection (FDEP), to which the County has applied for a permit to install the markers.

I have written previously of the reasons why the Foundation opposes the installation of these markers.

To recap:

- The proposed markers far exceed anything contemplated in the Clam Bay Restoration and Management Plan (Plan).
- These markers are inappropriate for a shallow, fragile preservation area such as Clam Bay, a designated Natural Resource Protection Area.
- These markers will have the inevitable secondary effects of more boats, more oil, more trash, and the degradation of the submerged aquatic vegetation in Clam Bay.
- These markers may imply navigability, and the Foundation does not believe that such navigability exists, or that, if it does exist, it is navigability generally for canoes and kayaks, and for motorized watercraft only at high tide.
- These markers may open up the possibility of dredging in Clam Bay for purposes of navigation, which the Foundation believes to be inconsistent with the nature of Clam Bay, not contemplated or approved by either the Florida Department of Environmental Protection (FDEP) or Army Corps of Engineers (Corps) permits (Permits), and not permitted by the Restrictions without the approval of the Foundation.
- There is no requirement in the Permits or the Plan that any markers be installed in Clam Bay.
- In any event, the Plan only dealt with markers in accordance with requirements imposed by the Coast Guard, and in the "main channel." The Coast Guard has not imposed any requirements for markers in Clam Bay, and, even if it had, the "main channel" referenced in the Plan does not cover Outer Clam Bay, and thus there is no support in the Permits for installing navigational markers of any kind in Outer Clam Bay.
- The Foundation is concerned that the placement of these markers at the mouth of Clam Pass will encourage boaters to believe that in fact Clam Bay is navigable and appropriate for power boat use, with potentially damaging impact to Clam Bay, to the boaters who might attempt to explore Clam Bay, unaware of its severe limitations for boating, and to the many swimmers from Clam Pass Park and from Pelican Bay's South Beach who swim in the area around Clam Pass.

Concurrent with the dispute over markers in Clam Bay, the County indicated its desire to obtain a 10 year permit giving it the right periodically to dredge Clam Pass. The first draft of the County's dredging permit application indicated that the purpose of the dredging was to obtain sand for Clam Pass Park. However, when this fact was pointed out to the County, the application was changed to reflect that the purpose of the requested dredging was for the health of Clam Bay's mangroves. The Restrictions provide that the county will not apply for any dredging permit without the prior written consent of the Foundation, which consent may be withheld in the sole and absolute discretion of the Foundation. The CBAC, the CAC, and the BCC have all approved the dredging permit application for Clam Pass. Despite requests that the County do so, the county has not submitted the application to the Foundation for its approval.

It should be noted that Clam Pass in its natural state, when it was open at all, was shallow, highly sinuous, and did not present a large volume cross section. In fact, Clam Pass closed 5 times in the 1978-1998 time frame. Recent dredging efforts have thus already clearly changed the natural status of Clam Pass, and the Foundation opposes any dredging of Clam Pass or Clam Bay for any purpose other than for flushing for the health of mangroves and other aquatic resources in Clam Bay (although we do not at this time object to the sand from such dredging being used to refurbish the beach at Clam Pass Park). Dredging of Clam Pass that is not carefully planned and controlled could cause serious erosion of the shorelines around the Foundation's property at South Beach, and could also lead to increased boat traffic in Clam Bay, with the potential for damage to Clam Bay and danger to the swimmers and waders using the Foundation's property at South Beach.

While the PBS&D was in control of Clam Bay, engineers from local firms monitored the health of Clam Bay. Their work as well as independent analysis confirmed that Clam Bay was a relatively healthy ecosystem, without any serious water quality problems. However, when control of Clam Bay was transferred to the CBAC, another firm, PBS&J, was brought in from out of town to conduct a study of the Clam Bay system. The report of that study was recently released (and is available on the Foundation's website). While a detailed analysis of the report is beyond the scope of this article, the final sentence of the report is enough to set alarm bells ringing: "In order to analyze potential changes to the system to improve circulation and dissolved oxygen (DO) within the Clam Bay system, a hydrodynamic model will need to be developed to understand the interactions between Clam Bay (Upper, Inner and Outer), Clam Pass, Moorings Bay, and Doctor's Pass."

The fact is that today we do not know what potential changes the County may be contemplating within Clam Bay, although it would appear that the "potential changes to the system" could include dredging within Clam Bay itself. The City of Naples and the County face substantial pressure from the FDEP and other authorities to improve water quality in the area, improvements that could cost hundreds of millions of dollars. There are those who fear that the County's actions in taking responsibility for Clam Bay away from the PBS&D, and away from the local marine, environmental, and coastal engineering consultants, all of whom have done such an excellent job in caring for Clam Bay, have as their genesis a desire to control Clam Bay and to include Clam Bay in a cleanup of the estuary systems to the north and

south of Clam Bay. The PBS&J report could be read as an initial step in support of the connection of Clam Bay and Venetian Bay.

The city of Naples 2009 Comprehensive Plan provides in part as follows:

“Currently, Clam Bay is connected to Venetian Bay by three culverts. There is concern that the existing interconnection does not provide adequate exchange of water between the Bays. The lack of proper flow of water between the Bays may impact water quality.

DESIRED RESULTS:

1. Provide a hydraulically efficient and adequate exchange of water between Clam Bay and Venetian Bay.
2. Improve water quality in Clam Bay and Venetian Bay.”

Again, this aspect of the city of Naples 2009 Comprehensive Plan is undoubtedly related to the pressure that the City of Naples is under to improve water quality in the city.

I believe that the County wants to be free to operate within Clam Bay as it sees fit over water quality issues, given the likely high cost to the County of cleaning up its water quality problems, without justifying its actions to the Foundation or seeking the Foundation’s approval, and that this is the essence of what is at stake, from the County’s perspective, as we fight the red and green lateral navigational marker battle. Of course, as County Commissioner Jim Coletta indicated, both in his interview with Jeff Lytle as reported in the Naples Daily News and in a meeting several of us had with him, he (and undoubtedly others within the county) wish to see greater public access to the beaches west of Clam Bay (in addition to the access that the original developer of Pelican Bay granted County residents by deeding property to the county at the south and north ends of Clam Bay, as per the Pelican Bay PUD). It is not difficult to imagine that one day the validity of the Restrictions could also be relevant to that issue, and that there are those within the County who are cognizant of that fact as we engage today in a dispute over red and green lateral navigational markers.

In short, the residents of Pelican Bay have a great deal at stake in the current battle over the installation of the markers, a battle that has implications that transcend the markers themselves. Countywide water quality issues are obviously critically important, and the County is to be commended for addressing them. However, the Restrictions grant the Foundation a seat at the table to ensure that Clam Bay’s status as a conservation and preservation area, and our Members’ substantial property interests, are being adequately protected. The ultimate question is thus whether the Restrictions are valid. Based upon what we know today it appears the Foundation has a strong case. There is still a lot of work to be done, however, before we can fully evaluate our chances of being able to convince a judge. And it is difficult to see how we will have a definitive answer to this question until a court decides it, since, even if even if we win before the regulatory authorities on the marker issue, or even if the county capitulates on that issue, the issue of the validity of the Restrictions for other purposes will remain open.

I should note at the outset that even the County agrees--at least today--that the Restrictions are valid in the uplands of Clam Bay. That is the basis on which the County is seeking the Foundation’s approval for its improvements at Clam Pass Park. The issue is whether the Restrictions are also valid in the

submerged lands of Clam Bay. The County has taken the position that the State of Florida owns these submerged lands. In the FDEP marker permitting process, the State of Florida has also taken the position that these submerged lands are owned by the State of Florida. We are advised that the claim of title by the State is consistent with its longstanding practice of claiming title to submerged lands whenever there is a possibility of State ownership.

We have an argument that as a matter of contract and as a matter of zoning law the Restrictions are valid as between the Foundation and the County in all of Clam Bay, even if the State is considered as owning some or all of the submerged lands. Florida courts have treated restrictions imposed when private property is deeded to a governmental entity as being equivalent to a contract between the private party and the governmental entity. In this case, that argument is buttressed since the Restrictions were required by the County as part of the Pelican Bay PUD. Our “contractual” argument has substantial merit, and it also has appeal as a matter of equity, since this forces the County to argue that it should be entitled to keep the benefits of the Quit Claim Deed to Clam Bay, a deed that was expressly made subject to the Restrictions, pursuant to the requirements of the Pelican Bay PUD, while at the same time arguing that those Restrictions should apply only to the uplands of Clam Bay. By so seeking to selectively deny the validity of the Restrictions, the County would in effect be attempting to defeat the purpose of the Restrictions, which were an integral part of the transaction with the County, as evidenced by the Pelican Bay PUD. One can imagine that a judge might not look favorably upon the County taking such a position.

In addition to our contractual argument, the Restrictions would be valid in the submerged lands if and to the extent those lands are owned by the county and not the State. Ownership of submerged lands hinges on whether the waters in question were “navigable” when Florida became a State in 1845. A seminal Florida Supreme Court case in this area established a rebuttable presumption that waters which were not meandered in the earliest Florida Government Land Office (GLO) Survey (meandered means measured with the precise location shown on the GLO Survey and in the surveyor’s notes) are considered to be non-navigable and thus not owned by the State. We have spent a considerable amount of time studying an 1874 GLO Survey of Clam Bay (the earliest GLO Survey of Clam Bay). None of the submerged lands within Clam Bay were meandered in the 1874 GLO Survey. In addition, Clam Pass did not even exist at the time of the 1874 GLO Survey (the fact that Clam Pass is relatively new can be seen from the tree stumps visible in the middle of Clam Pass at low tide). As a result, in any litigation involving title to submerged lands in Clam Bay, the State of Florida or any party claiming that title to such submerged lands is in the State of Florida would have the burden of rebutting this presumption of non-navigability with evidence that these submerged lands were navigable in fact at the time of statehood. Moreover, this cannot be accomplished by contradiction of the 1874 GLO Survey or GLO Township Plat (which are official acts of the executive branch and are intended to be, and are, conclusively deemed to be correct), and would, therefore, have to rely upon some separate source of evidence – perhaps pre-dating the 1874 GLO Survey. We have not been able to locate any such evidence, but that does not mean that it does not exist. While we have all of the State’s title files (from an Official Records Request), which do not show any evidence of navigability, we have to assume that the State and the County will be searching all available sources to try to be able to show navigability.

Given the 1874 GLO Survey, it would seem highly unlikely that the State and/or the County are going to be able to find any such evidence of navigability, but one cannot be certain of that fact.

The fact that the 1874 GLO Survey indicated that Clam Pass was not even in existence in 1874 would make it even more difficult for any party to meet the burden of proving the navigability of at least Clam Pass at the time of statehood. In addition, Clam Pass closes from time to time, and is kept open only via dredging. The argument certainly exists that the navigability of all of the submerged lands within Clam Bay is dependent upon Clam Pass being kept open via dredging. That argument would seem to support a finding that, in its natural state, the submerged lands in Clam Bay are not navigable today, and thus were unlikely to have been navigable in 1845.

In addition to our "lack of navigability" argument, we have an argument that the State expressly disclaimed ownership of the submerged lands in Clam Bay in a 1959 Disclaimer. That argument hinges upon what the State intended in granting the Disclaimer. We have made a careful study of a 1958 Disclaimer request made by the Collier Company for a portion of what was then known as Clam Bay, and the subsequent 1959 request for a Disclaimer for the rest of what was then called Clam Bay. The 1959 Disclaimer encompasses what we now call Clam Bay. These Disclaimers make it clear that the Collier Company was seeking for the State to disclaim any interest in sovereign submerged lands. It would appear, given the express language used in the 1958 request, and the express reference in the 1959 request to the 1958 request and Disclaimer, that it will be difficult for the State to argue successfully that the State did not intend to relinquish title to submerged lands in the 1959 Disclaimer.

We have additional arguments based upon a 1953 Florida Statute, as well as a Warranty of Title that the State gave to Hamilton Disston, the individual who originally purchased what is now Clam Bay from the State, both of which buttress our arguments based upon contract, lack of navigability, and the Disclaimer.

The Foundation, entrusted by the developer of Pelican Bay with the power, and the obligation, to enforce the Restrictions, is currently taking the following actions to protect the interests of the residents of Pelican Bay:

- The Foundation has requested a hearing before an administrative law judge on the issue of whether the FDEP was correct in concluding that the County has the right to install the markers due to an exemption from the normal FDEP permitting rules.
- The Foundation has requested a hearing before an administrative law judge on the issue of whether the County must first obtain the written approval of the Foundation before the FDEP can issue a permit for the installation of the markers.
- The Foundation is monitoring and dealing as appropriate with the efforts of the County to obtain permission for the installation of the markers from the Florida Fish and Wildlife Conservation Commission, the United States Coast Guard, and the Army Corps of Engineers.

November 9, 2009

- The Foundation has (through its attorneys) hired a consulting coastal engineer to advise it on the issues involved with the County's permit application for dredging Clam Pass and with the PBS&J report.
- The Foundation has hired attorneys to advise it on the validity of the Restrictions and on appropriate means of enforcing them.